

**ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE**

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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of:

) No. R-13-0032

)

) **COMMENT OF ARIZONA**

Petition to Amend Rule 41, Forms  
18(a) & 18(b), Arizona Rules of  
Criminal Procedure

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE REGARDING PETITION**

) **TO AMEND RULE 41, FORMS**

) **18(a) & 18(b), ARIZONA RULES OF**

) **CRIMINAL PROCEDURE**

)

)

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 AACJ supports the proposed amendments of these forms, but not for the same reasons stated in the rule change petition. Currently, the forms for plea agreements state that defense counsel avows not only that the defendant was

advised of the terms of the plea and that the defendant's questions were answered to the best of counsel's ability, but also that counsel "believe[s] that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein." As stated by the petitioner, counsel may not agree that the plea and disposition are appropriate because they are too harsh, but nevertheless agree that it is in the client's best interest to accept this particular plea because it is the best offer the client can obtain under the circumstances.

¶3 An additional concern with the current avowal of counsel in plea agreements is that it invades the attorney-client privilege by requiring counsel to reveal in a compact signed by the prosecution and entered into the record by the court what counsel thinks about the case, even if such revelation is in the most general terms. Counsel might not agree that it is in the defendant's best interest to enter into the plea agreement; counsel might believe, for example, that the prosecution cannot prove its case in whole or in part or that an allegation of prior convictions is fatally flawed, and that the defendant is likely to obtain a better result by taking the case to trial. Counsel's role is to advise the defendant of the benefits and hazards of any decision; but it is ultimately the client's decision, and the client may choose to take the plea offer extended by the prosecution regardless of how much the attorney protests.

¶4 The amendment to the avowal in the petition would strike the language that offends the attorney-client privilege and the duty of candor to the tribunal, and would replace it with: “I believe that the defendant’s plea is knowing, intelligent, and voluntary and that the plea and disposition are consistent with law.” AACJ is concerned that the final phrase of this statement has an unclear meaning. But AACJ supports the modification because counsel is supposed to advise the client in such a manner that the plea is knowing, intelligent, and voluntary before the client enters into it. This avowal informs the prosecution and the court only that defense counsel has performed the duty of ensuring that the client is competent to enter into a plea and understands the terms of the plea and the evidence in the case. Whether the plea is in the defendant’s best interest is a question for the defendant (if anyone) to answer, not counsel.

¶5 For these reasons, AACJ respectfully requests this Court grant the petition to amend Rule 41, Forms 18(a) and 18(b), so that defense counsel is not required to make inappropriate avowals that invade the attorney-client privilege.

DATED: May 21, 2013.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/  
David J. Euchner

This comment e-filed this date with:

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